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Reported below:
265 N. Y. 170, 192 N. E. 188.

Certiorari granted:
293 U. S. 554.

IN THE

Supreme Court of the United States

No. 546—October Term, 1934.

WILLIAM ROBERTS, as Receiver of the Manhattan Railway Company, and others,

Petitioners,

against

THE CITY OF NEW YORK, *et als.*,

Respondents.

BRIEF FOR THE CITY OF NEW YORK, RESPONDENT.

[The abbreviation "R." refers to the fifth volume of the Record. The abbreviation "AX." refers to the other four volumes, which, being the record of a former trial, were introduced in evidence and marked Exhibit A-X at the second trial—the trial which terminated in the order and judgment now before this Court.]

Preliminary Statement.

The respondents before this Court consist of (1) the City of New York, and (2) groups of property owners in a defined area of assessment who are obligated by statute to defray the cost of the improvement effected by the condemnation and removal of the 42nd Street Spur. All of the respondents are equally interested in sustaining the order and judgment under review.

By arrangement between counsel for the various respondents, the scope of the briefs will conform approxi-

2. Nothing for the easement in respect of a portion of open frontage—the width of a certain street called Depew Place;

3. $235 for the elevated structure itself, being the scrap value of the iron, etc., composing it;

4. Nothing for the franchise and right to occupy 42nd Street.

The petitioners appear to assert, in reference to these four items, that (1) the compensation for the easements was arbitrarily measured by the value of the easements at the time of their acquisition by the railroad, rather than by the value at the time of condemnation; (2) though the Depew Place easement cost the railroad nothing because the frontage it represents was in City ownership in 1885, yet compensation should be paid because the frontage was in private ownership at date of condemnation; (3) the physical structure should have been compensated for on the basis of cost of reproduction less depreciation; and (4) the franchise and right to be in the street had a substantial value because the spur was part of a profitable system.

Whether in rejecting these contentions the Courts below transgressed constitutional limitations depends to no small degree on factual considerations, and it will be the burden of respondents' briefs, and particularly of this brief, to show that, whatever their *a priori* merit, the petitioners cannot prevail in the face of certain undisputed facts which place the 42nd Street Spur in a class by itself.

The Opinion of the Public Service Commission.

Upon the conclusion of the hearings before the Public Service Commission conducted pursuant to the statute mentioned above (L. 1919, ch. 611), a formal opinion was rendered. It is reported *sub nom. Matter of Manhattan*

Ry. Co. (Removal of 42nd Street Spur), 12 P. S. C. Rep. (1st Dist.) 58 (1921). The conclusion of the Commission was that traffic on the spur was steadily declining and that the removal of the spur would not cause a decline in the railroad's earnings but rather an increase. The Commission said (p. 69):

> "The conclusion to be drawn from the above is that the Third Avenue line is securing its full and fair share of the increased traffic at Forty-second Street caused by the development of that section, and it is securing it without any assistance whatever from the spur, where traffic is actually on the decline.
>
> In the second place, the record shows that if this spur were removed, there would be a tremendous increase in building operations extending as far east on Forty-second Street as Third Avenue; that this would result in bringing many more people to that section, many of whom would for convenience use the Third Avenue line, and would supply a profitable short haul traffic. That the constant flow of people from these buildings to the Third Avenue line would turn much additional traffic in that direction is obvious. Accordingly, even if the lease of the elevated road to the Interborough Rapid Transit Company were to be cancelled (which seems to be a remote possibility), the removal of this spur would not cut the company off from the Forty-second Street district and would not deprive the company of its share of traffic from that district, but rather would extend that district so as to embrace Third Avenue, with much resultant benefit to the Third Avenue Elevated Railroad."

On April 22, 1921, the Commission issued a certificate which reads, in part, as follows (AX., 1108):

> "Now, therefore, the Public Service Commission for the First District
>
> DOES HEREBY CERTIFY, pursuant to said Chapter 788 of the Laws of 1917, as amended and supple-

mented by said Chapter 611 of the Laws of 1919, that the tracks, structure, station and appurtenances of the Manhattan Railway Company in East Forty-second Street, in the Borough of Manhattan, City of New York, are no longer necessary and convenient for the public service, and constitute an impediment and obstruction to the public use of said street."

This determination of the Public Service Commission, the Manhattan Railway Company, owner of the spur, made no effort to have reviewed, although under State law a writ, or order, of certiorari to the Appellate Division of the Supreme Court was a readily available and adequate remedy. See Code of Civil Procedure, §§ 2120 *et seq.*, the statute in force in 1921; and see *People ex rel. New York & Queens Gas Co.* v. *McCall*, 219 N. Y. 84, 89 (1916), aff'd 245 U. S. 345 (1918).

The consequences of this omission are obvious. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210 (1908).

Facts.

(1)

We come now to the testimony which bears upon petitioners' present claim, item No. 1, *i. e.*, that the easements of light, air and access acquired from the abutting owners had, when condemned, a value of $3,600,000.

Needless to say, the record presents a dispute as to facts, for so far from conceding the petitioners' figure,* the City refused to concede any value to the easements.

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* Petitioners' brief (p. 8) is unfair on this detail. The City refrained from challenging this figure because it denied the pertinence of the underlying theory. O'MALLEY, J., said (AX., 1981): "The city did not attempt to controvert this proof by the testimony of other experts. * * * In fairness to the city, however, it should be noted that its counsel at all times disregarded the claimants' theory and that adopted by me, and for this reason refrained from calling experts on this phase of the case."

There were, the Court will recall, two trials in this proceeding. The decision on the first trial was reversed for errors of law, and a new trial ordered. At this second trial the entire transcript of record (four volumes) upon the first appeal was offered and received in evidence (R., 202).

In the second volume of the testimony at the former trial, the petitioners' witness Huntley was asked the following question (AX., 852):

> "Q. What in your opinion was the fair market value of the easements of light, air and access in and over East 42nd Street appurtenant to the properties on the line of the elevated railroad spur abutting thereon, occupied and taken by the elevated railway and its operation in front of said premises at the date of vesting title in the City on December 7, 1923?"

Before the question was answered by the witness, the following colloquy took place between the Court and the attorney for the claimants (AX., 854):

> "The Court: The value to whom?
> Mr. Nichols: I said the market value.
> The Court: Don't you mean worth to the railroad?
> Mr. Nichols: The market value.
> The Court: To whom?
> Mr. Nichols: To the abutting property owners. These easements are now of course being acquired for the beneficial enjoyment of the abutting property owners."

In other words, disregarding the fundamental rule that "the question is what has the owner lost, not what has the taker gained", *Boston Chamber of Commerce* v. *City of Boston*, 217 U. S. 189, 195 (1910), the petitioners are here shown to have rested their whole case upon an inadmissible

theory of damages. And while the City is not before this Court either as an appellant or as a petitioner, yet we feel it has the undoubted right to point out the foregoing error for the purpose of defeating the efforts of petitioners to have the figure given by the witness receive the sanction of this Court. To such a figure, precedents under the Fourteenth Amendment do not, and in reason could not, lend any support whatever.

The City's objections having been overruled, the witness answered as follows (AX., 854):

> "A. $3,601,491 actual calculation, or say in round figures $3,600,000."

And see AX., 1027.

In opposition to the petitioners' contentions as to value, exemplified in Mr. Huntley's testimony, the City called Mr. Brady, who testified (AX., 953):

> "Q. I want to ask you this question: Assuming that the Manhattan Railway Company owned easements in the property abutting on 42nd Street, which enabled it to maintain an elevated railroad structure in 42nd Street, and operate cars and trains thereover free of damages and right to damages, and free of interference and right of interference on the part of the owners of property abutting on 42nd Street, and also assuming that the easements owned by the Manhattan Railway Company constitute in law an estate in the property abutting on 42nd Street which the Company can sell and convey only to the owners of the property abutting on 42nd Street, but that the only way in which the abutting owners can be put into possession of such easements in case of a sale and conveyance is by the demolition of the elevated railroad structure in 42nd Street, and the surrender of its franchise from the State and City in 42nd

Street. What, in your opinion, was the fair market value of these easements on December 7, 1923, just before title vested? A. No value."

If, as seems to be generally conceded (see *Story* v. *New York Elevated Ry. Co., supra*, and *Muhlker* v. *N. Y. & Harlem R. Co.*, 197 U. S. 544 [1905]), the so-called "easements" which the petitioners assert they were compelled to "acquire", are really the easements of light, air and access of the abutting owners which the railroad obtained the right to impair or to damage, the absurdity of the form of the question put to Mr. Huntley becomes further manifest. For the abutters were not buying back their own easements, but as a result of the condemnation proceedings found themselves repossessed of their right to enjoy them unimpaired; and they were regaining them by virtue of the fact that the railroad which had been impairing them for 46 years had lost the sole justification for its existence—public convenience and necessity.

Here, as before, we desire to emphasize the fact that the abutting owners' gain is not the railroad company's loss. The two items are forever separate and discrete, and to confuse them is to give insufficient recognition to the circumstance that one who is encumbering a public street with his structures has a far less perfect, secure and permanent right to their maintenance than he who builds a house on his own land.

A row of squatters' huts down the center of a boulevard may cut in half the value of the land bordering it; but this does not aggrandize the value of the huts for the purposes of the Fourteenth Amendment. Nuisance value has yet to attain constitutional dignity. *Consolidated Gas Co.* v. *City of New York*, 157 Fed. 849 (S. D. N. Y., 1907.)

The Court of Appeals gave in three distinct portions of its opinion an endorsement of these views as to the nature of the so-called "easements". POUND, Ch. J., said (R., 411):

> "The railroads have a State and city street franchise and an elevated structure and the right to interfere with the light, air and access of abutting owners."

And again (R., 412):

> "Quite apart from the discussion of the cases, it is clear that the railroad merely exhausted the right of the abutting owners to complain because the railroad was in the street and so trespassing on their property."

And once more (R., 413):

> "such rights were obtained in order to permit the roads to exercise their franchise in the street in perpetuity."

In view of these repeated assertions, we ask the Court to attribute but little countervailing force to the somewhat looser and less thoughtful language found at the bottom of R., 411, where the same Judge said:

> "The railroad thereafter acquired title to these easements at large expense."*

We feel constrained to express regret that the petitioners should include (brief, p. 25) the statement that "what the owner lost was property which has always been valued in relation to the abutting property". The statement is regretted (1) because there is nothing in the record to support it; (2) because it is absurd in principle to suppose that

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*Judge POUND added (R., 414): "It [the railroad], therefore, acquired no real title to these easements apart from the operation of its road."

the value of the railroad's franchise should increase in value step by step with increases in the fee value of abutting property; and (3) because the statement is untrue.

To permit the abutting owners' "agitation for the removal of the spur" (petitioners' brief, p. 29; and see A[illegible], 825), to render the foregoing principles inapplicable is to ignore the settled doctrine that Courts will not inquire into the motives of the Legislature in passing statutes. See in this connection *Matter of City of New York (Ely Avenue)*, 217 N. Y. 45 (1916), where the Court said (p. 59):

> "This court has recently held that the courts will not impute to the legislature or the discretionary action of municipal bodies clothed with legislative powers other than public motives for their acts; that the presumption that legislative action has been devised and adopted on adequate information and under the influence of correct motives will be applied to the discretionary action of municipal bodies and will preclude all collateral attack (*McCabe* v. *City of New York*, 213 N. Y. 468), and this rule has long been established by decisions of this court."

That the so-called "easements" were listed in the statute (L. 1919, ch. 611) among the items of railroad property to be condemned is not a recognition by the Legislature that they must have had great value, in spite of the intimations to the contrary in the petitioner's brief (pp. 5, 6, 31). If, for example, the City desires to convert a private street (*i. e.*, a strip of land burdened with private easements of passage) into a public street, the usual way to it is to *condemn* the private street. But in view of the pre-existing burdens, the amount payable is nominal. See *Matter of City of New York (Decatur Street)*, 196 N. Y. 286 (1909).

(2)

A disproportionate importance has been assigned by the petitioners to the fact that the Courts below awarded no compensation for the easements of light, air and access insofar as they related to a certain strip of abutting property known as Depew Place.

This small street leads northward from the north side of 42nd Street, but does not cross the latter (AX., 1932). It is 50 feet in width, and was open as a public street from 1885 until 1905, when it returned to private ownership. It was thus privately owned in 1923, the date of the condemnation of the spur (R., 266).

No award for the easements of the railroad in front of this 50 foot Depew Place was made. The Trial Justice held that either the railroad had never acquired rights in the frontage (it never purported to buy them, and the strip was not in private ownership long enough for prescription to be accomplished), or that the rights if acquired were like the rights to cross any other intersecting street and hence not such that the City would have to pay for them upon their termination.

(3)

The petitioner's claim to an award of reproduction value less depreciation, for the physical structure in the street, was sought to be established by the testimony of the witness Burpee. He at first testified (AX., 341) that the estimated cost less depreciation was $201,322, but subsequently modified this estimate by deducting certain items of the structure found to be outside of the condemnation area, so that he gave a net figure of $185,513.

This testimony was based upon the premise that the spur was "a suitable structure for the operation of the elevated railroad in this locality" (AX., 387).

The City brought out upon the cross examination of one of the claimant's witnesses, Mr. Harden, a steel contractor, that he had purchased from the railroad the iron pillars and other portions of the structure for the sum of $255. As Mr. Harden had contracted to take down and carry away the structure, this sum represented the net value of the structure after the performance of such services.

A minor error in the record seems to have been made in the transcription of this figure, for Mr. Justice MULLAN recited in his opinion (R., 331) that the parties had agreed that the junk or scrap value of the structure was $235.00.

The City justified the use of this figure rather than the very much larger figure advocated by the claimants,* by pointing out that the claimants had failed to show that any reasonably prudent man would reproduce an elevated spur in 42nd Street at the time in question (AX., 339). And in view of the certificate of the Public Service Commission (*ante*, p. 5), which at this time had already been given, that an elevated spur in 42nd Street was no longer necessary or convenient for the public service, the possibility that anyone would reproduce the structure and operate it was obviously too fantastic and speculative to support a claim of unreasonableness in the figure adopted by the Court.

We submit that Mr. Justice MULLAN's holding was correct, for reconstruction costs possess pertinence in condemnation cases only where the structure is, at the moment of condemnation, suitable and adequate for a purpose for which the neighborhood is adapted. See in this connection

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* The City's expert gave testimony in rebuttal as to reproduction value less depreciation, without prejudice (AX., 458) to the City's main contention. This expert placed the figure at $120,438 (AX., 467).

United States v. *Boston, Cape Cod & N. Y. Canal Co.*, 271 Fed. 877 (1st Circ., 1921), where the Court said (p. 889):

> "It seems to us that this is a necessary limitation upon the application or use of the rule when construction prices are abnormal, and that the court below either should have passed upon the preliminary question of fact himself, or submitted it to the jury, with instructions that *they should not consider the evidence of reconstruction cost* upon the question of value, unless they were satisfied that a reasonably prudent man would purchase or undertake the construction of the property at such a figure." (Italics ours.)

(4)

The railroad proceeded to erect its structure in 1878 pursuant to L. 1875, ch. 606. Under § 26 of this statute, railroad corporations are, when the existence of a need for a railroad has been certified by competent authority (see § 1), empowered to use the street, and "in all cases the use of the streets, avenues, places and lands designated by the said commissioners and the right of way through the same for the purpose of a railway or railways as herein authorized and provided, shall be considered, and is hereby declared to be a public use • • •."

The value of this franchise and the right to be in the street was the subject of extensive testimony by the petitioners' witnesses.

Mr. Burpee, on behalf of petitioners, assigned a value of $400,000 to the franchise and right to be in the street but on direct examination failed to show how he figured it. Naturally, the Assistant Corporation Counsel did not let him repair the omission on cross examination. The following colloquy occurred (AX 1026-1027):

> "Q. What is your total estimate? A. $4,170,000.

Q. How much of that was for the value of the easements which the company claimed to have gotten from abutting owners? A. $3,600,000.

Q. How much was it for the value of the space to the City? A. $300,000.

Q. And what is the difference? That makes $3,900,000. What is the difference between $3,900,000 and $4,170,000? A. Cost to reproduce the physical structure $176,100; other elements of franchise value $100,000, totalling $4,176,900, which I have rounded down to an even $4,170,000.

Q. You have already testified to the cost of reproduction? A. Yes, sir.

Q. Is this the same figure? A. Yes, sir.

Q. Now, this $100,000 for franchise rights, what do you mean by that? A. Those are all the other elements of the franchise value possessed by the Manhattan. The spur was an integral part of a system of the Manhattan Railway Company's property... It was contributing net earnings, and by its removal the net earnings of the system—

Q. I did not ask you how you got at it. I asked you what that was for. All other rights you said, didn't you? A. Yes, sir."

There would seem to be no basis for inferring the transfer to the railroad of title in fee to all the little areas where the pillars rest.* The franchise and right to be in the street are not to be valued at so much per square foot of street physically occupied. Franchises even when bound up with a right to be in a public street are incorporeal property, and long established usage shows that valuation by earnings is the proper mode of valuation. *People ex rel.*

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* The intention to transfer title to areas in the street is negatived by the fact that the railroad was at no time granted leave to use the street for any and all purposes, but only to operate an elevated railroad. When that use has ceased to be lawful, no considerations of policy require the railroad to be accorded an interest or estate in the street which would survive such cessation. *Heard* v. *City of Brooklyn*, 60 N. Y. 242 (1875), *post*, p. 20.

Jamaica Water Supply Co. v. *Tax Com'rs*, 196 N. Y. 39, 55 (1909); *Montgomery County* v. *Schuylkill Bridge Co.*, 110 Pa. St. 54, 59 (1885).

The City contended that the franchise and its incidents, on these principles, had no value, in view of (1) the issuance by the Public Service Commission of the certificate (AX., 1108) that the spur was no longer necessary or convenient for the public service, and (2) the concurrent factual findings of the Courts below (R., 290, 414-415) that the spur could no longer be operated, except at a large annual loss. And the City, in addition to relying upon these factors, also called two witnesses.

One of these, Dr. Bauer, was asked a hypothetical question (AX., 616-617), as to the value of the "elevated structure, tracks, stations, platform, stairways and appurtenances and all rights, easements and franchises of every nature whatsoever under which said elevated structure, tracks, stations, platforms, stairways and appurtenances were constructed and maintained, and also the right, easement and franchise to further maintain said elevated railroad structure, tracks, stations, platforms, stairways and appurtenances"; and he answered (AX., 622):

> "A. I believe there is no value, except whatever scrap value there might have been on demolition."

To a substantially similar hypothetical question (AX., 792), Mr. Brackenridge, another City witness, said (AX., 793):

> "A. Of no value except scrap value."

Dr. Bauer went on to explain (AX., 622) that if he had thought the demolition of the spur would decrease the income of the Third Avenue line, he would have assigned some value to the spur. But, he said,

> "on the contrary I believe it [demolition] will increase the net earning power of the system."

In adverting to the spur's want of earning power at the moment of condemnation, we are not unmindful of the general proposition stated by petitioners (brief, pp. 43-44) that "where property taken is part of a profitable system, constitutional protection against confiscation" should not be denied "because the particular part taken produces an operating loss". We maintain the case fails to present a minor premise under the major premise thus phrased. The distinguishing feature of the case at bar lies in the fact, stressed by the Public Service Commission, *ante*, p. 5, that the demolition of the spur would not merely put an end to a loss but, by increasing the attractiveness of the neighborhood, the size of the office buildings which it would pay to erect there, and hence the population and business activity of the region, demolition would positively increase traffic on the main line along Third Avenue.

Argument.

We trust we have made it clear that the property which the petitioners maintain was so grossly undervalued as to deprive them of rights guaranteed by the Fourteenth Amendment, was property of an unusual character, and possessed features so extraordinary that care must constantly be taken to avoid the inconsiderate application to it of decisions intended to apply to property with more conventional attributes. Noteworthy among the characteristics of petitioners' property were its inadaptability to other than its actual use, its unassignability, and its *symbiosis* with public necessity and convenience, in the sense that when the latter concepts ceased, it expired, so to speak, concurrently.*

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* Public convenience and necessity may be said to bear to the petitioners the relationship which a *cestui que vie* bears to the holder of an estate *pour autre vie*.

It is the function of the Fourteenth Amendment not to create property rights but to protect them. We must turn to the State law to ascertain what sort of rights have been created before we can say whether any particular act on the part of the State has accorded to those rights less than the constitutional standard of protection.

This brief, as announced *ante* page 2, deals principally with the nature of the petitioners' property. That the pursuit, to their logical conclusion, of the doctrines evolved by State law for the limitation of that property and its qualification by special attributes, does not violate constitutional limitations will be discussed in the brief of the Respondents GOELET *et al.*

Upon the record as hereinbefore outlined, we propose to argue as follows:

1. The failure of the railroad to appeal from the decision of the Public Service Commission disentitles it to relief in this Court.
2. Under the doctrine of *Heard* v. *Brooklyn*, 60 N. Y. 242, the easements acquired by the railroad reverted automatically to the abutting owners when the operation of the railroad ceased.
3. The theory of unjust enrichment may not be invoked to justify an increase in the awards.
4. The "most advantageous use" doctrine has no application to an elevated spur which under the law can be used for but a single purpose.

POINT I.

The failure of the railroad to appeal from the decision of the Public Service Commission disentitles it to relief in this Court.

The maxim *petere fontes, non sectari rivulos,* possesses a certain pertinence to the case at bar. The petitioners complain of their inability to collect from the respondents more than a paltry $539,352.41 (with 11 years' interest) for the property which was condemned. But, in the last analysis, what caused them to lose it and to receive such a pitifully small compensation for it, was the order and certificate of the Public Service Commission finding that the spur had ceased to be either necessary or convenient for the public service. That order and that certificate dealt the spur its deathblow. They were the *fons et origo* of the petitioners' misfortunes. From that moment the spur was moribund. Obviously the certificate operated directly to destroy the petitioners' claim to higher compensation than they received, for there could be no market for a structure (or the privilege of erecting one) so long as the Public Service Commission's determination, that the structure was no longer necessary or convenient for the public service, remained outstanding and unreversed.

If the petitioners felt aggrieved by the determination, they should have secured its review upon certiorari, as was their privilege under State law (see *ante*, p. 6). As they did not do so, they cannot complain of reductions in the value of their property flowing directly from such determination. From that omission proceeded the whole of their distress and the affliction is not one from which they can secure relief in this Court.

The case of *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 230 (1908), held that where a State Commission had, after hearings, ordered adherence to a schedule of railroad rates, a carrier who deemed them confiscatory was under the duty to exercise a right to appeal to the state court of last resort from the Commission's order before seeking to enjoin its enforcement in a federal district court.

To substantially the same effect is *Gorham Manufacturing Co.* v. *State Tax Commission*, 266 U. S. 265, 269-270 (1924).

POINT II.

Under the doctrine of *Heard* v. *Brooklyn*, the easements acquired by the railroad reverted automatically to the abutting owners when the operation of the railroad ceased.

Under State law an easement, or similar *jus in re aliena*, acquired for a particular purpose generally ceases and determines, and may be said to revert to the owner of the land across which the easement has been acquired, whenever the use to which the easement was a *sine qua non* ceases.

An express decision to this effect is *Heard* v. *City of Brooklyn*, 60 N. Y. 242 (1875). Here a railroad company had obtained from the legislature authority to appropriate the use of lands for railroad purposes, and in exercise thereof had acquired the use of a strip of land adjoining a certain avenue. Subsequently the defendant decided to widen the avenue, and received from the railroad a deed to so much of its right of way, stripped of the tracks, as was needed to bring the avenue to the desired width. The plaintiff, as successor in interest to the parties from

whom the railroad had secured its rights of way, brought ejectment; and the Court of Appeals held that the complaint stated a good cause of action. A judgment of dismissal was accordingly reversed, and a new trial ordered.

The Court pointed out (p. 246) that the railroad in exercising its statutory powers "became entitled only to the use of the land for the purpose of operating its railroad. The fee remained in the original owners, subject only to that use, and on the discontinuance of the use, the owners were entitled to resume possession of the land." This reversionary interest arises whenever (p. 247) "land has been taken for a particular use only, and that use is discontinued and abandoned."*

The logic of this decision seems unanswerable. It has stood unchallenged for nearly sixty years. *It antedated the acquirement of the easements in the case at bar.* And we know of nothing in the Federal Constitution which permits one who has acquired a piece of property, with this well-defined characteristic of evanescence, to reject the essence of his purchase and argue that he bought something entirely different.

See also *Drucker* v. *Manhattan Ry. Co.*, 213 N. Y. 543 (1915), where in the course of an inquiry into an abutting owner's right (upon selling his land) to reserve to himself the right to claim damages to easements of light and air caused by the erection of an elevated railroad, the Court said (p. 551):

> "The whole difficulty in this case is theoretical and results from the fact that we are dealing with an incorporeal right. * * * Here the thing itself could not be reserved because from its nature it could not

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* The powers of the railway company in the case at bar to acquire property are couched in language (L. 1875, ch. 606, § 17) substantially similar to that used in the statute before the Court in the *Heard* case.

> exist independently of the land. But its equivalent or substitute, the damages caused and to be caused by the appropriation of it by a third party, was reserved."

This incapacity of the easements to exist in the railroad apart from the franchise and the physical structure impairs their alienability. In fact, it makes it impossible to assign them in gross. This circumstance consequently impairs their value.

The quality may be said to be a "congenital infirmity"* in the easements, and not an acquired characteristic flowing from action taken by the State after the easements came into existence. This being so, the Courts below rightly took it into account in rejecting the petitioners' claims to have the easements valued at what the abutting owners could sell them for if the structure were being erected today.

POINT III.

The theory of unjust enrichment may not be invoked to justify an increase in the awards.

The arguments which we advanced in the preceding point as to the evanescent character of the easements show that the petitioners obtained more, rather than less, than they were entitled to when POUND, Ch. J., held (R., 413):

> "* * * the city should reimburse the railroads for what it cost them to acquire such easements when it terminates the right of use in perpetuity."

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* *Norman* v. *Baltimore & Ohio R. Co.*, 55 Sup. Ct. 407, 416 (U. S., 1935).

Judge Pound evidently accorded some force to the theory of unjust enrichment put forward by the petitioners.

We contend, nevertheless, that this theory has too slender a basis in fact to require this Court, on constitutional grounds, to upset as inadequate the awards made below.

The basis of the unjust enrichment of the abutting owners seems to rest in the notion that their property underwent a sudden and tremendous increase in value when the spur was removed. From this, petitioners appear to spell out something legally akin to a transfer of an article of value from the railroad to the abutting owners, for which the latter should pay fair value.

But Judge Pound pricked this bubble when he said (R., 413-414):

> "That these easements would be worth $3,600,000 to the abutting owners if they now owned them is beside the point. What is the city taking from the railroads? That is the question."

It is important to note at this juncture (and in answer to arguments made at pages 32, 34 and 37 and elsewhere in petitioners' brief) that while, as matters now stand, the burden of remunerating the petitioners rests upon the abutting property owners (*ante*, p. 1), nevertheless there always exists the possibility that the Municipal Assembly of the City of New York may under the authority of L. 1924, ch. 363, §§ 16 and 17 (the City Home Rule Law), as amended by L. 1925, ch. 397, pass a Local Law changing the incidence of the burden from the adjacent property owners, and spreading it over the Borough of Manhattan, or the City at large, as a tax levy payable in annual instalments.

Furthermore, if the contentions of the petitioner be rephrased to stress the fact that by the railroad's act in removing the spur, the abutting property was freed from a depressing influence, the answer is that the railroad was not making a voluntary gift but was simply discontinuing an activity which had since 1921 ceased to possess any legal sanction. Forbearance to do an illegal act is no consideration for an express promise, and is equally incapable of supporting a suit founded upon *quantum valebat*.

Nor does the unjust enrichment theory gain plausibility when we view the case (for the sake of argument) as an instance of failure of consideration for the sums paid by the railroad in 1888-1904 under the compulsion of the *Story* case (*supra*). For forty-six years the railroad enjoyed a *quid pro quo;* and the spur having ceased to produce profits and ceased to be a public convenience through no act of the abutters, no case is made out for a duty on their part to refund the purchase price. On the contrary, the continued existence of the spur until it had become an anachronism, really caused losses to the abutters far exceeding the consideration originally paid them; for its presence prevented them for years from developing their land with modern skyscrapers in keeping with developments on neighboring property.

In contending that the easements for which the railway company paid valuable consideration in the years 1888-1904 were taken from them at the time of the condemnation of the 42nd Street Spur, the petitioners appear to have lost sight of the distinction between the "taking" of a piece of property, and the termination of an incorporeal right. That the occurrence in the case at bar was of the latter rather than of the former category is apparent from the holding

of this Court in *Omnia Commercial Co., Inc.* v. *United States*, 261 U. S. 502 (1923), where this Court said (p. 508):

> "The contract in question was property within the meaning of the Fifth Amendment, *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 690; *Cincinnati* v. *Louisville & Nashville R. R. Co.*, 223 U. S. 390, 400, and if taken for public use the Government would be liable. But destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense."

And again (pp. 510-511):

> "What was here requisitioned was the future product of the Steel Company, and, since this product in the absence of governmental interference would have been delivered in fulfillment of the contract, the contention seems to be that the contract was so far identified with it that the taking of the former, *ipso facto*, took the latter. This, however, is to confound the contract with its subject-matter. * * * Plainly, here there was no acquisition of the obligation or the right to enforce it."

See also *Mullen Benevolent Corp.* v. *United States*, 290 U. S. 89, 95 (1933).

POINT IV.

The "most advantageous use" doctrine has no application to an elevated spur which under the law can be used for but a single purpose.

We have already suggested (*ante*, p. 17) that there is danger in this case of overlooking certain distinguishing features of the railroad's property, and of applying lead-

ing cases to the situation without an inquiry into whether the facts justify such action. In other words, we beg leave, with deference, to urge upon the Court circumspection against false analogies.

In *Olson v. United States*, 292 U. S. 246 (1934), this Court said (p. 255):

> "The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held."

And again in *Boom Co. v. Patterson*, 98 U. S. 403 (1879), this Court said (p. 408):

> "So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

The New York courts are as well aware as any of the soundness and justice of these holdings as propositions applicable to the generality of cases. See *Matter of City of York (Blackwell's Island Bridge)*, 198 N. Y. 84, 87 (1910).

But all these references to "highest and most profitable use" or "uses for which the property is suitable" (see

petitioners' brief, p. 23) lose their relevance for the simple reason that no option, no range of choice, is or ever was available to the railway company. Its presence in the street was sanctioned for one purpose only, the maintenance of an elevated railroad. That right was defeasible by appropriate action, taken pursuant to law, by the Public Service Commission. The company's easements were never assignable in gross. It could not have erected stores or dwellings upon its structure, nor conveyed to anyone the right to do so. Hence the dissenting Judge erred when he attributed to the easements "the value which the owner could otherwise have obtained as the price of their sale or abandonment" (R., 422).

These contentions are, we maintain, well founded in theory. They are also well founded in fact. For notwithstanding the wide latitude allowed the petitioners in the introduction of evidence, the Appellate Division said of the easements in question (R., 302):

> "No one would acquire them today for the purpose of running a railroad."

And again (R., 302-303):

> "The railroad urges that it might have abandoned the spur and sold these rights to the property owners. But such a proposition is based upon fanciful assumptions, to sustain which there is no evidence in this record. Testimony is lacking to show that any or a sufficient number of property owners would or could purchase said rights. The argument presupposes a relinquishment of all other damages because it would be necessary to demolish the structure and rebuild the Third Avenue station in order to deliver a single so-called easement. [The Court of Appeals agreed. See R., 414.] Market value cannot be predicated upon a single sale. In addition, it has already been judicially determined that such a con-

> sideration is a mere 'hypothetical possibility'. (*McGovern* v. *City of New York*, 229 U. S. 363; *City of New York* v. *Sage*, 239 U. S. 57.)"

In view of these expressions from the Court below, this Court will, we believe, be somewhat unsympathetic toward the petitioners' remonstrances (brief, pp. 22, 25, 26 and 34) against the persistence of the Courts below in "ignoring its [the spur's] availability for other uses or for sale" (p. 22).

Not only was no other use lawful under L. 1875, ch. 606, but any other use would have been a breach of the conditions upon which the railroad procured for a consideration the right to impair the abutters' easements of light, air and access. These conditions expressly limited the permissible impairment to such as was "caused by said maintenance and operation of said railroad as the same is now constructed, maintained and operated • • •; provided, however, that in no case shall said structures, or the operation of trains thereon be changed, enlarged or added to, so as to materially increase the encroachments upon the easements • • •" (AX., 1649-1650). The condemnation order contained substantially the same words of qualification (AX., 1754).

Consequently, whenever, for instance, the elevated railroad has found it necessary to increase the tracks along a given street from two to three, it has always had to make a further payment of compensation to the abutters. *Rothschild* v. *Interborough Rapid Transit Co.*, 162 N. Y. App. Div. 532, 147 N. Y. Supp. 1040 (1st Dept., 1914).

Further evidence of the qualified rights of the railroad in the easements is found in the language of Chief Judge Pound, at R., 414, where he said:

> "It [the railroad], therefore, acquired no real title to these easements apart from the operation of its road."

Conclusion.

We believe that the foregoing exposition of the law of New York, coupled with the analysis of the decisions of this Court under the Fourteenth Amendment so effectively made in the brief filed on behalf of the Respondents Goelet, *et al.*, require the affirmance of the order and judgment under review. We are likewise confident that the Court will not lose sight of the peculiar attributes of the property for which the protection of the Constitution is sought, especially the clauses in the easement deeds cited *ante*, p. 28; nor will the Court be misled by the false analogy of cases dealing with land owned by a condemnee in fee. And we finally maintain that when an elevated railroad spur has remained standing in the heart of a great city, and has prevented the abutting property from developing *pari passu* with the rest of the neighborhood, a claim that the railroad may profit by its maintainance of an anachronism is a shameless and intolerable exaltation of nuisance value. To hold that the Fourteenth Amendment protects and sanctions such practices would not add lustre to the Constitution.

The order and judgment should be affirmed, with costs.

Dated, New York, N. Y., April 1, 1935.

Respectfully submitted,

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